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No. 174

In the Supreme Court of the United States

OCTOBER TERM, 1947

ROBERT SEALFON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the circuit court of appeals (R. 589–595) is reported at 161 F. 2d 481.

JURISDICTION

The judgment of the circuit court of appeals was entered May 8, 1947 (R. 596). On June 5, 1947, by order of Mr. Justice Burton, the time for filing a petition for a writ of certiorari was extended to July 7, 1947 (R. 598). The petition was filed July 3, 1947, and was granted on October 13, 1947 (R. 598). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether, under the principle of collateral estoppel, petitioner's acquittal on a charge of conspiring with several persons to defraud the United States by uttering false invoices to a rationing board precluded his subsequent conviction of aiding and abetting the uttering of certain invoices by some of the persons named as co-conspirators in the prior indictment.

STATUTE INVOLVED

Section 28 of the Criminal Code (18 U. S. C. 72) provides:

> Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the

> United States, knowing the same to be false, forged, altered, or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to or presented at, the office of any officer of the United States, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States, shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Section 332 of the Criminal Code (18 U. S. C. 550) provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

On October 2, 1945, two indictments were returned against petitioner and others in the United States District Court for the District of New Jersey (R. 5, 8–33; Ex. D–3, R. 54). The one on which the instant prosecution is based charged that petitioner, Fresh Grown Preserve Corporation, and its officers, Leo and Murray Greenberg, for the purpose of defrauding the United States and to induce the rationing board of Rutherford, New Jersey, to issue sugar replacement certifi-

cates, did knowingly utter and publish as true false invoices purporting to show sales of vanilla syrup by Fresh Grown to petitioner for delivery to the Brooklyn Navy Yard, an exempt agency for sugar products, whereas the syrup had in fact been delivered by Fresh Grown to petitioner for purposes other than delivery to an exempt agency. The indictment contained 12 counts, each relating to a particular invoice presented to the rationing board on a specified date between October 19, 1943, and April 6, 1944 (R. 8–33).

The other indictment charged a continuing conspiracy among the defendants named in the indictment described above and three other corporations, S. J. Baron Corporation, Royal Crown Bottling Co. of Baltimore, Inc., and Royal Crown Bottling Co. of Washington, Inc., and William C. Franklin, president of the Royal Crown companies. It charged that, during the period from January 1, 1943, to April 15, 1944, the defendants conspired to commit offenses against the United States by presenting false invoices to the Rutherford rationing board purporting to show sales of sugar products for delivery to exempt agencies, by making false representations in this respect to the rationing board in a matter within its jurisdiction, and by such means defrauding the United States of its governmental function of conserving and rationing sugar. The indictment alleged that it was part of the conspiracy that Fresh Grown would deliver to the

other conspirators large amounts of sugar and sugar products for their own purposes and not for sales to exempt agencies, that in order to deceive the United States, the defendants would keep false records in regard to their shipments and receipt of sugar and sugar products, and that petitioner, Baltimore Royal Crown, and Baron would deliver to Fresh Grown letters indicating that they had made sales principally to exempt agencies, whereas in fact they had made few, if any, sales to exempt agencies. As overt acts the indictment alleged the delivery by each of the three named conspirators of the letters referred to above, the presentation by Fresh Grown to the rationing board of a number of false invoices, purportedly showing deliveries to companies not named in the indictment as defendants, and the filing with the board of a number of fraudulent applications for the replacement of sugar (Ex. D–3, R. 54).

The conspiracy indictment was tried first.[1] Of the defendants named therein, Fresh Grown and its officers pleaded guilty, and the S. J. Baron Corporation pleaded nolo contendere (R. 571), so that the trial proceeded against petitioner, the Royal Crown companies and their president (Tr.

[1] The stenographic transcript of the first trial was introduced in evidence at the trial of the second case, in connection with petitioner's motion to quash and plea in bar, as Ex. D–2 (R. 38). This exhibit, together with the conspiracy indictment (Ex. D–3), has been lodged with the Clerk of this Court. References to the exhibit are designated as "Tr."

563). At the close of the Government's case, the court granted a motion for a directed verdict of acquittal as to the Royal Crown companies and their president (Tr. 377–424, 436–438) and later in his charge instructed the jury to return such a verdict (Tr. 563), with the result that the jury was called upon to reach a determination as to whether petitioner was implicated in a conspiracy involving the Greenbergs, Fresh Grown and the Baron corporations. (Tr. 562, 563.)

The evidence adduced at that trial may be summarized as follows:

Under regulations governing the rationing of sugar, industrial users were allotted a quota based on a percentage of the amount used for civilian and non-export purposes in 1941. In computing this allotment, there was excluded from consideration the amount contained in products delivered for export or for use of certain exempt agencies, such as the armed services. For such sugar, replacement certificates, in addition to the civilian quota, could be issued by local rationing boards on evidence deemed by them sufficient to show delivery of the sugar products to exempt agencies (Tr. 63–65, 66–69, 74–77).[2]

[2] The procedure was changed after July 1, 1943, to require applications for replacement of sugar in products sold after that date to be made to the exempt agencies themselves (Tr. 65–66, 70–71, 73–74), but the Rutherford Rationing Board was unaware of the change and continued to act in accordance with the prior procedure until around April 1944 (Tr. 100, 102–103, 109, 112–113, 118).

In February, March, and April 1943, Fresh Grown, through Leo Greenberg (see Tr. 81–82), applied to the Rutherford Rationing Board, and was given replacements, for sugar in products allegedly sold for export or for delivery to an exempt agency, to four different corporations not named as defendants in the indictment. He presented to the rationing board invoices purporting to show deliveries to the companies for such purposes, but no sugar products had in fact been sold by Fresh Grown to those companies, except some few deliveries to Colonial Stores, Inc., which did not correspond to the invoices submitted to the rationing board, and which were not made for shipment to exempt agencies. (Tr. 121, 144, 158–159, 162–164, 166–167.)[3]

In February 1943, one Sanford Doctors, who was employed by a sugar broker, arranged to sell some of Fresh Grown's vanilla syrup to petitioner, who conducted his business under the name of Sero Syrup Co. (Tr. 191–192). Late in February, Murray Greenberg told Doctors that if petitioner would give him a letter stating the places where he delivered syrup, and if there were exempt agencies in that group, it would be possible to deliver more syrup to petitioner (Tr. 193–194, 217–218,

[3] When this testimony was introduced, petitioner's counsel objected to it on the ground that it was not binding on his client, and the court allowed it in evidence subject to having the motion renewed if the Government failed to establish a conspiracy involving petitioner (Tr. 122, 144–145, 160, 165; see also Tr. 123).

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219). Doctors conveyed the message to petitioner (Tr. 194–195). Petitioner delivered to Greenberg a letter, dated March 3, 1943, reading as follows (Ex. G–7, Tr. 223, 339):

> In regard to your request for information about our sales outlets we wish to advise you that at the present time some of our syrups are being sold at the Brooklyn Navy Yard, Republic Aircraft, General Aircraft, Sheepshead Bay Training Station, and various other defense plants throughout Long Island. The total amount used by these plants varies from approximately 1,200 gallons to 2,000 gallons per week.

Petitioner had made no sales of syrup to the Brooklyn Navy Yard (Tr. 240–241). He had sold to a canteen, which operated vending machines for civilian employees at the Brooklyn Navy Yard, a few gallons of syrup, but none of it was vanilla syrup (Tr. 460–462, 465–469, 481–482, 485–486).

The letter was not shown to the Rutherford Rationing Board (Tr. 97–98, 111–112, 117), but Fresh Grown presented to the rationing board a number of invoices purporting to show sales of vanilla syrup to petitioner for delivery to the Brooklyn Navy Yard. On the basis of these applications, Fresh Grown received replacement certificates for 21,727,855 pounds of sugar and delivered syrup containing almost 10 million pounds of sugar to petitioner (Tr. 131–132, 235). Petitioner at first paid for the syrup by check (Tr. 264–272), but from June 1943 made pay-

ments to Fresh Grown in cash, giving a check to his trucker, who cashed the check, deducted the trucking fee, and then delivered cash to Greenberg (Tr. 251–252, 256, 278). Ninety-eight percent of the syrup purchased by petitioner from Fresh Grown was delivered to the National Biscuit Co., and the balance to other nonexempt agencies (Tr. 254–255, 259, 482). Petitioner paid to Doctors approximately $12,000 as an alleged finder's fee (Tr. 198–200, 212–214).

In March 1943, Leo Greenberg asked Martin Lowenthal, who acted as broker in Fresh Grown's transactions with the S. J. Baron Corporation, to obtain from Baron a letter setting forth where he disposed of the syrup sold to him by Fresh Grown, stating that if the syrup went to exempt agencies Fresh Grown would be in a position to get additional sugar. Lowenthal transmitted the message to Baron (Tr. 167–171). The first letter sent by Baron did not enumerate specific places to which the syrup was delivered, and was rejected (Tr. 171–172). Baron then sent another letter stating that his company made sales to various army and navy stations which he enumerated (Tr. 172–173; Ex. G–8, Tr. 176, 336). On the basis of invoices purporting to show sales to the Baron Corporation, for shipment to such exempt agencies, Fresh Grown received replacement certificates for 610,278 pounds of sugar (Tr. 137–138). 342,330 pounds in the form of vanilla syrup were sold by Fresh Grown to Baron, but none of the syrup

was delivered to the exempt agencies listed (Tr. 183–185).[4]

In all, Fresh Grown received replacement certificates for 25,578,144 pounds of sugar on the basis of invoices purporting to show sales for delivery to exempt agencies or for export (Tr. 132–133).

At the close of the case, petitioner moved to strike all testimony and exhibits not relating to his client, including those relating to the Baron transactions (Tr. 502–506). In overruling the motion outside the presence of the jury, the judge stated that he thought it was a question of fact for the jury to determine whether there was an over-all conspiracy participated in by petitioner, the Greenbergs, and Baron (Tr. 506–507; see also Tr. 508, 512).

In his summation for the defense, counsel, among other things, stressed the fact that the Greenbergs had made false applications to the rationing board before petitioner's letter of March 3 was written (Tr. 522–523). He pointed out that the indictment charged that the conspirators kept false books, but that there was no

[4] Petitioner objected to the admission of evidence concerning Baron's transactions with Greenberg on the ground, *inter alia*, that it related to a separate conspiracy between Baron and the Greenbergs. The judge instructed the jury that the evidence was not to be considered against defendants other than those to whom the testimony related until such time as there appeared to be sufficient evidence of a conspiracy among them and the other defendants (Tr. 168–170, 175, 181–182).

evidence that petitioner had kept false books (Tr. 523). He stressed the fact that Fresh Grown had received more than 21 million pounds of sugar on the basis of false applications involving alleged deliveries to petitioner, whereas petitioner obtained only nine million pounds from Fresh Grown, and argued (Tr. 527–528):

> If the Greenbergs were co-conspirators of ours, we had an outlet to the National Biscuit; they got 21,000,000. I think it is now proven and conceded that we got about 9,000,000. Why shouldn't we have taken all the 21,000,000 if we knew about that, if we knew that they got 21,000,000 why shouldn't we have taken all of it? We could have sold it, you can say to yourselves from the evidence, to the National Biscuit Company.

He also said (Tr. 538–539):

> * * * Baron had nothing to do with us, nor has anyone else anything to do with us in this case. Our dealings are directly with the Greenbergs, as the proof shows; no connection between Baron or any other person. They didn't know us and we didn't know them. I think that's the proof in the case. We decline to be responsible for any of their activities with the Greenbergs or the activities of any other persons and the Greenbergs. * * *.

The United States Attorney, in his summation, admitted that the Greenbergs initiated the practice of filing false applications before the letter of March 3d, but pointed out that, initially, they

were allegedly for export purposes (Tr. 546–547). He referred to the Baron letter, and said (Tr. 552):

> * * * We ask you to consider the evidence introduced about the Baron participation in order to show you that there was a conspiracy and what the plan was and how it operated; and if you look at the letter of March the 29th you will see that it is not very much different than the one of March the 3d which Sealfon wrote. * * *

He referred to the fact that the Greenbergs acted through a broker in making suggestions to Baron just as they had with respect to petitioner, and said (Tr. 553–554):

> * * * And there again is the pattern and the plan of this conspiracy, and it makes no difference whatever, ladies and gentlemen, whether the Baron Corporation ever knew Sealfon or whether Sealfon ever had any transactions of any kind with that company. * * *
>
> If you consider the similarity between those two transactions you will see that the plan was there and carried out in the same identical manner. * * *

In submitting the case to the jury the judge charged (Tr. 565–566, 568, 569):

> The elements of a conspiracy are, first, an object to be accomplished, which must be either the commission of an offense

against the United States or the commission of an offense to defraud the United States; secondly, a plan or scheme embodying the means to accomplish the object; thirdly, an agreement or understanding between two or more persons whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means agreed upon; and, fourth, as I have said, an overt act by one or more of the conspirators, to effect the object of the conspiracy.

* * * You, of course, must determine from the evidence whether or not a conspiracy existed, and then if you find that a conspiracy did exist, you must determine who were the members thereof. Of course, if you should find that there was no conspiracy, that would end the matter completely. In the event that you determine that a conspiracy did exist and that the defendant conspired with others named in the indictment, whether they are actually on trial or not, then for such of them as you may find to have been engaged in the conspiracy, certain rules will apply. I shall refer to those rules and when I refer to them you must keep in mind that they apply only if you find a conspiracy existed and that this defendant was a member of such conspiracy and that he conspired with others named in the indictment to attain the ends set forth in the indictment.

It is necessary, of course, to show that the defendant conspired and that all of the co-conspirators, the alleged co-conspirators, rather, had a purpose common to each of them, and that common purpose is an essential prerequisite. Of course, entry into the conspiracy may be made after its initiation, provided the person who entered it after it was formed had knowledge of its aim and had an intent to participate in the common agreement and to forward its design. Mere knowledge of the existence of a conspiracy, or even acquiescence in or approval of its ends and aims, without cooperation or agreement to cooperate, is not sufficient to make one a conspirator to commit the act. * * *

* * * * *

All members of the conspiracy need not know all of the acts done by any other member in order to effectuate the end of the conspiracy. It is enough that they have the common purpose, that they entered into the common agreement to effectuate the illegal purpose, and that they were members of the conspiracy; because they are held to be responsible for the acts of co-conspirators done in furtherance of the conspiracy, provided you find the conspiracy exists and that this defendant and the persons whose acts are in question are members of this conspiracy.

* * * * *

I shall repeat to you that the common

> design, which is the essence of the conspiracy, may be shown by proof of acts or circumstances from which a mutual understanding may be inferred, but you must be satisfied beyond a reasonable doubt that there was a meeting of the minds of all concerned in so far as the objects of the conspiracy are concerned.

The judge did not refer to specific testimony nor by name to particular alleged conspirators, except that, in ruling on petitioner's various requested charges, he did give request No. 12, reading as follows (Tr. 578):

> If upon a consideration of all of the evidence you entertain a reasonable doubt as to whether this defendant conspired or confederated or agreed with the defendants Greenberg or Fresh Grown Preserve Corporation, New Jersey, or either of them, to commit the crime charged, then the defendant must be acquitted.

He said, "That I have already charged, but I will repeat it." The jury acquitted petitioner (R. 37).

Thereafter, the Government proceeded with the trial on the indictment for the substantive offenses previously returned against Fresh Grown, the Greenbergs, and petitioner (see, *supra,* pp. 3–4). Fresh Grown and the Greenbergs pleaded guilty with the result that petitioner alone was tried (R. 5).

Petitioner moved to quash the indictment on

the grounds that the second trial would place him in double jeopardy and that, on the principle of *res judicata*, the previous judgment was conclusive as to all issues raised in the instant indictment (R. 37). He introduced in evidence the previous indictment, the stenographic transcript of the trial, and a certificate of petitioner's acquittal (Exs. D-1—D-3; R. 37-38, 54). The judge overruled petitioner's motion and also a plea in bar on the same grounds, and the case went to trial (R. 52-54).*

At the second trial, which proceeded on the basis that petitioner was an aider and abettor of the Greenbergs (R. 59-60), the Government again had an expert witness testify to the regulations governing industrial users of sugar and the right to obtain replacement certificates for sugar in products sold to exempt agencies (R. 83-91). It introduced in evidence the false invoices mentioned in the indictment purporting to show sales of vanilla syrup by Fresh Grown to petitioner for delivery to the Brooklyn Navy Yard (R. 225-230, 239-243, 248-253, 257-258).

* The *res judicata* principle was invoked on objection to the prosecutor's opening statement (R. 64; see R. 59); the motion on such ground was renewed and overruled after the Government's opening statement following extended discussion (R. 70-81); and objections to testimony on the ground that the issues had been litigated at the previous trial were made throughout the second trial (R. 100-101, 136-137, 146-147, 240-241, 273, 315, 316, 338-342). The motion was again renewed at the close of the Government's case (R. 344-345, 359), and at the close of the whole case (R. 476-477).

Doctors testified, as at the previous trial, concerning his arrangement of the initial sale of Fresh Grown syrup to petitioner, his conversation with petitioner to the effect that Murray Greenberg wanted a letter stating to which exempt agencies petitioner made delivery, and to the fact that petitioner paid him an alleged finder's fee (R. 102–109). The Government introduced the letter of March 3d (Ex. G–4, R. 145) and showed that petitioner had made no sales to the Brooklyn Navy Yard (R. 337–338). It showed that the Greenbergs received more than 21 million pounds of sugar for replacement of sugar in syrup allegedly sold to petitioner for delivery to the Brooklyn Navy Yard (R. 270–271), and that almost 10 million pounds were sold as syrup by Fresh Grown to petitioner (R. 283–284, 315); that 98 percent of the syrup sold to petitioner was delivered to the National Biscuit Co. (R. 285–287). It showed that, starting in June 1943, payments for the sugar were made in cash by checks given to the trucker (R. 290–293).

In addition, the Government proved that petitioner's basic quota for each of the years 1942, 1943 and 1944 was no more than approximately 200,000 pounds (R. 100). On cross-examination of petitioner, who at this trial took the stand in his own behalf, the Government brought out the fact that petitioner had unsuccessfully attempted to obtain from his own rationing board in Brooklyn, New York, sugar replacement certif-

icates for sales to the defense industries listed in the letter of March 3d, and that he had claimed that he made sales at the Brooklyn Navy Yard (R. 413–424).

It also introduced the testimony of Murray Greenberg, who had not testified at the first trial except to identify, on behalf of the Fresh Grown Corporation, a certain exhibit (Tr. 332–334). Greenberg testified that he first met petitioner at the time of the initial sale of syrup to him through Doctors in January 1943 (R. 138). He said that petitioner kept asking him for more syrup and that he replied that he could not make further deliveries under his quota (R. 139–140). After Greenberg had had a conversation with Doctors, petitioner visited him at his plant (R. 140). Greenberg reported the conversation as follows (R. 140–141):

> Then Mr. Sealfon visited me at Lyndhurst and said that he was selling a civilian company at the Brooklyn Navy Yard and that if he would write me a letter saying that he was selling to or at the Brooklyn Navy Yard without mentioning the civilian company, to leave the inference that he he was selling the Brooklyn Navy Yard, what kind of a deal could he work out; and I said to Mr. Sealfon, "What kind of a deal would you like or would you want?" and Mr. Sealfon said he would like if he did that, he would like a cheaper price in the form of a rebate. And I said to Mr.

> Sealfon, "How much of a rebate would you want?" and he said, "Two cents a pound." And I said, "You write me that letter and you have got a deal."

Greenberg testified that he told petitioner that he would take the letter to the local rationing board and would attach invoices showing that sales of syrup were made to petitioner for delivery to the Brooklyn Navy Yard (R. 141–142, 150). Greenberg and petitioner drew up a draft of the letter of March 3 (R. 146), and subsequently Greenberg received the letter in final form, together with a contract calling for the delivery of 1,200 gallons of syrup per week (R. 143; Ex. G–4, R. 145; see R. 520). Greenberg testified that he gave petitioner a rebate of two cents a pound on all replacements of sugar he obtained, even on sugar not used in products delivered to petitioner (R. 152, 190–191). The rebates were paid in cash and amounted to one-half a million dollars (R. 152). The arrangements for the payment of cash by petitioner to Fresh Grown were made in order that Greenberg might have the cash from which to pay the rebates to petitioner (R. 153–154).

In submitting the case to the jury, the judge read the aider and abettor statute (18 U. S. C. 550), providing that—

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its com-

mission, is a principal.

* * * * * *

and said—

> An aider and abettor is a person who, although not the direct perpetrator of a crime, yet does some act to render aid to the actual perpetrator thereof, or to abet the perpetration of the offense. * * * (R. 543.)

After reviewing the evidence that petitioner had made attempts to get sugar replacements, that he had made a few purchases from Greenberg, and that subsequently he received large quantities of syrup from Greenberg (R. 550), the court said (R. 551):

> * * * that discussion which was had between Greenberg and Sealfon is the crux of this situation. * * *
>
> The Government has introduced in evidence a letter and has brought before you the testimony of Greenberg which preceded the writing of the letter. It is for you to determine what is the truth of that whole situation. The fact is admitted that before the discussion and before the letter Sealfon received certain amounts of syrup from Greenberg, and that thereafter he received enormously increased amounts. These are elements which have been testified to and which you may use as a basis for drawing your inferences. There is a direct conflict in the testimony of Greenberg and Sealfon as to what happened about that letter. Sealfon gave an explanation which

it is for you to determine whether it is reasonable or not, and which will also be of importance in your determination.

The jury convicted petitioner on this indictment (R. 565–566). Petitioner was sentenced to imprisonment for five years and fined $1,000 on each count, the prison sentences to run concurrently (R. 574). On appeal the judgment of conviction was affirmed (R. 596).

SUMMARY OF ARGUMENT

Admittedly, petitioner's trial as an aider and abettor was for a different offense from his earlier trial for conspiracy. Hence the aspect of *res judicata* involved in the instant case is the application of the principle usually designated as estoppel by judgment or collateral estoppel, that the judgment in a prior action is conclusive only as to those matters actually in issue upon which the finding or verdict of the jury necessarily rested. *Cromwell* v. *County of Sac*, 94 U. S. 351, 353.

We start with the assumption that, as stated by this Court in *United States* v. *Adams*, 281 U. S. 202, 205, the principle of collateral estoppel does apply to successive criminal trials for different offenses. It is, nevertheless, firmly established that that doctrine is inapplicable unless the issue determined by the prior judgment can be ascertained clearly, definitely, and unequivocally. Where the record of the first trial reveals that the verdict of the jury may have been based on alternate grounds, neither ground can be taken as conclusively established by the prior verdict.

Washington, Alexandria and Georgetown Steam-Packet Company v. *Sickles*, 24 How. 333; *De Sollar* v. *Hanscome*, 158 U. S. 216.

In the instant case, the record of the first trial reveals that the verdict of acquittal does not, as petitioner contends, necessarily constitute a finding that petitioner had not entered into a corrupt agreement with the Greenbergs pursuant to which he wrote the letter of March 3d. The entire trial for conspiracy was predicated on the theory that petitioner was a party to a general over-all conspiracy involving, ultimately, petitioner, the Greenbergs, and the Baron Corporation, and the jury was never definitely or even impliedly told that petitioner could be convicted if he was not part of the over-all conspiracy but merely entered into a separate corrupt agreement with the Greenbergs. As the case was presented, summed up by counsel on both sides, and submitted to the jury by the judge, there was at least as great, if not a greater possibility, that the jury was impelled to return a verdict of acquittal on a finding that petitioner was not a party to the over-all fraud as on a finding that petitioner did not write the March 3d letter pursuant to a corrupt agreement with the Greenbergs. Hence the verdict of acquittal at the first trial can be taken as establishing only that the whole offense submitted to the jury was not proved, i. e., that petitioner was not a party to an over-all conspiracy involving petitioner, the Greenbergs and their corporation, and

the Baron Corporation. It is not a finding as to any particular ground which may or may not have influenced the jury to reach that ultimate conclusion. *United States* v. *Adams*, 281 U. S. 202, 205. Hence, the verdict is not a finding that petitioner had not entered into a corrupt agreement with the Greenbergs.

Since, at the second trial, the Government was not required, in order to establish petitioner's guilt as an aider and abettor of the substantive offenses charged, to show that petitioner participated in a conspiracy involving persons other than the Greenbergs, the acquittal on the conspiracy charge did not preclude the Government from offering proof tending to show that petitioner wrote the letter of March 3d pursuant to an agreement with the Greenbergs for the specific purpose of enabling the Greenbergs to obtain and sell to petitioner large quantities of sugar in the form of syrup to which he was not entitled.

ARGUMENT

THE PRINCIPLE OF COLLATERAL ESTOPPEL IS INAPPLICABLE TO THIS CASE SINCE THE ACQUITTAL AT THE FIRST TRIAL DID NOT NECESSARILY REPRESENT A FINDING THAT PETITIONER HAD NOT ENTERED INTO A CORRUPT AGREEMENT WITH THE GREENBERGS ALONE

A. THE PRINCIPLE OF COLLATERAL ESTOPPEL APPLIES ONLY WHERE THE BASIS OF THE PRIOR JUDGMENT CAN BE ASCERTAINED CLEARLY, DEFINITELY AND UNEQUIVOCALLY

The principle of *res judicata*, as applied in civil cases, has two aspects. One is the doctrine of *res judicata* in the strict sense of the term, i. e.,

that a judgment in one action is a bar to another action on the same claim or demand, not only as to every matter which was in fact litigated, but as to every matter which might have been litigated in the prior action. The other, usually designated as estoppel by judgment, or collateral estoppel, applies even where the second action between the same parties is upon a different claim or demand, but then the judgment in the prior action is conclusive only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. *Cromwell* v. *County of Sac*, 94 U. S. 351, 353; *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 48–52; *Mercoid Corporation* v. *Mid-Continent Co.*, 320 U. S. 661, 671.

The first aspect is not here involved. For the most part, that principle, as applied to criminal cases, is governed by the constitutional prohibition against double jeopardy which bars a second prosecution for the same offense. And, even where the defense of double jeopardy may not be available, as for example, where the first prosecution has been determined on a plea in bar before the defendant has been placed in jeopardy, this Court, invoking the doctrine of *res judicata*, has held that a judgment on the merits in the first prosecution is a conclusive bar to the second, despite the absence of a constitutional prohibition

against the second trial. *United States* v. *Oppenheimer*, 242 U. S. 85, 87–88.*

Here, however, the second prosecution is not for the same offense as the first. Petitioner has in this Court abandoned the contention made in the district court that his trial as an aider and abettor in the commission of the substantive offenses charged in the second indictment after his acquittal of conspiracy placed him in double jeopardy. The decisions of this Court definitely establish that conspiracy is a distinct offense from the substantive crimes which may be the object of the conspiracy, and that separate trials for conspiracy and for the substantive crimes do not violate the constitutional limitation against double jeopardy. *United States* v. *Bayer*, 331 U. S. 532, 541–543; *Pinkerton* v. *United States*, 328 U. S. 640, 644; and see dissenting opinion of Mr. Justice Rutledge in the *Pinkerton* case at p. 649. See also *Louie* v. *United States*, 218 Fed. 36, 39–40 (C. C. A. 9).

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* In the *Oppenheimer* decision, in rejecting the Governments contention that *res judicata* does not exist for criminal cases except to the extent that it is covered by the double-jeopardy provision of the Fifth Amendment, the Court, speaking through Mr. Justice Holmes, said that "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt" (p. 87). Authorities were cited for the view that the criminal law and the civil law are in unison in this respect (p. 88).

For other expressions by the Court that *res judicata* is applicable in criminal cases, see *Frank* v. *Mangum*, 237 U. S. 309, 334; *Collins* v. *Loisel*, 262 U. S. 426, 430.

The question here is whether the principle of collateral estoppel, as distinct from double jeopardy or *res judicata* in the strict sense, serves to preclude, not petitioner's trial, but petitioner's conviction of the substantive offenses on the basis of the evidence adduced against him on the second trial. Petitioner's contention, in essence, is that the evidence introduced against him on the trial for the substantive offenses was designed to prove that he was an aider and abettor because he had entered into a corrupt agreement with the Greenbergs, pursuant to which he knowingly aided the commission of the substantive offenses, and that, since the first trial had determined that he had not entered into a corrupt agreement with the Greenbergs, the jury should not have been allowed at the second trial to find an agreement and determine guilt on the substantive offenses on the basis thereof. He does not deny that he could properly have been convicted as an aider and abettor if the Government's proof had established knowing assistance without agreement. And he does not deny that if the testimony offered at the second trial could properly have been considered by the jury, there was sufficient evidence adduced to support his conviction for knowingly and actively assisting in the commission of the substantive offenses charged in the second indictment.

We can start with the assumption that the principle of collateral estoppel in civil cases—that a fact definitely found in one action is conclu-

sively established between the same parties even where the second action is based on a different claim—applies to successive criminal prosecutions for different offenses. On the basis of *United States* v. *Oppenheimer, supra,* this Court, without discussion, so stated in *United States* v. *Adams,* 281 U. S. 202, 205.[7] Lower federal court decisions[8] and most state authorities[9] are to the same effect, although they differ in their methods of applying the principle to specific facts. The principle may be accepted for the purposes of this case.[10] But it is a firmly established tenet that

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[7] In this case, in overruling a plea of former acquittal because the offenses were different, the Court stated that the judgment was nevertheless "conclusive upon all that it decided." The case is further discussed at pp. 41–43, *infra.*

[8] *United States* v. *De Angelo,* 138 F. 2d 466, 468 (C. C. A. 3); *Woodman* v. *United States,* 30 F. 2d 482, 484 (C. C. A. 5), certiorari denied, 279 U. S. 855; *United States* v. *Meyerson,* 24 F. 2d 855, 856–857 (S. D. N. Y.); *United States* v. *Morse,* 24 F. 2d 1001 (S. D. N. Y.); *United States* v. *McConnell,* 10 F. 2d 977, 979 (E. D. Pa.); *United States* v. *Dockery,* 49 F. Supp. 907, 908 (E. D. N. Y.); *United States* v. *Halbrook,* 36 F. Supp. 345, 348 (E. D. Mo.); *United States* v. *Carlisi,* 32 F. Supp. 479 (E. D. N. Y.); *United States* v. *Clavin,* 272 Fed. 985, 987 (E. D. N. Y.)

[9] The state authorities are collected in 147 A. L. R. 991–993, 994–995; see also Freeman, *Judgments,* 5th ed., vol. 2, pp. 1364–1365.

[10] It is worth noting, however, that an anomaly results from the application of the doctrine to criminal cases. In the *Adams* and *Oppenheimer* cases, the judgments in the prior cases had been in favor of the accused. If the principle of repose, on which the doctrine rests (see *Southern Pacific Railroad* v. *United States,* 168 U. S. 1, 50) is valid, it should apply equally to convictions as well as acquittals.

collateral estoppel cannot be applied unless that which was determined by the prior judgment can be ascertained clearly, definitely, and unequivocally. In *Russell* v. *Place*, 94 U. S. 606, 610, this Court said:

> According to Coke, an estoppel must "be certain to every intent;" and if upon the face of a record any thing is left to conjecture as to what was necessarily involved and decided, there is no estoppel

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It is in fact more easily applied to convictions, where a jury must find that every element of the offense charged has been proved, than to acquittals, where a jury must acquit if any one element is not established. Yet, although this Court has allowed a criminal conviction to be taken as conclusively establishing the facts necessary to sustain an injunction (*Local 167* v. *United States*, 291 U. S. 293, 298), and some state courts have given conclusive effect to a prior conviction as establishing facts to be determined in a second criminal prosecution (see *Commonwealth* v. *Ellis*, 160 Mass. 165), general application of the doctrine would, it seems to us, present difficulty. For example, if the doctrine of collateral estoppel were logically applied, proof alone of conviction for conspiracy would, applying the doctrine of *Pinkerton* v. *United States*, 328 U. S. 640, be enough to establish liability for substantive crimes contemplated by the conspiracy and actually committed pursuant thereto. Yet, since a court cannot in criminal cases take away from the jury its prerogative of acquitting in the teeth of the evidence, no verdict of conviction could be directed, and it seems unlikely that a conviction for the substantive offenses would be allowed to rest merely on proof of conviction for conspiracy. See *United States* v. *De Angelo*, 138 F. 2d 466, 468 (C. C. A. 3); *United States* v. *Carlisi*, 32 F. Supp. 479, 482 (E. D. N. Y.). In actual practice, federal trials for different offenses arising out of the same transaction have proceeded on proof *de novo* even though a conviction has been obtained.

in it when pleaded, and nothing conclusive in it when offered as evidence.

"To hold upon any unsubstantial ground that a controversy has beer thus concluded is to do an injustice to litigants." *Vicksburg* v. *Heuson,* 231 U. S. 259, 268.

Because of this limitation, this Court has held that, where the record of the first trial reveals that the verdict of the jury may have been based on alternate grounds, neither ground may be taken as conclusively established by the prior verdict for the purpose of applying the principle of collateral estoppel. Thus in *Washington, Alexandria and Georgetown Steam-Packet Company* v. *Sickles,* 24 How. 333, plaintiffs brought an action on a contract and contended that a verdict in their favor in a prior action had definitely established the existence of the contract. This Court pointed out, however, that in the prior action, there were only two counts upon the contract and other general counts in assumpsit, that the verdict was a general one on the entire declaration and might have been rendered on the common counts. It accordingly held that, in the absence of proof that the existence of the contract had necessarily formed the basis of the jury's verdict in the prior action, the prior judgment could not be relied upon as establishing the existence of the contract. See also *Packet Company* v. *Sickles,* 5 Wall. 580.

In *De Sollar* v. *Hanscome*, 158 U. S. 216, Hanscome's agent had executed a contract for the sale of real property to De Sollar. Hanscome, claiming to have repudiated the contract, had brought an action against De Sollar for damages in placing the contract on record. That action was defended on two grounds: (1) That Hanscome had ratified the act of his agent and (2) that De Sollar had acted in good faith in placing the contract on record. The jury had returned a verdict for De Sollar. In an action by De Sollar for specific performance of the contract in which Hanscome again claimed to have repudiated the contract, De Sollar argued that the judgment in the prior action had conclusively established Hanscome's ratification of the contract. This Court pointed out that, although the judge in the first trial had told the jury that the chief question was whether Hanscome had ratified the contract, he had also charged that there was no question of punitive damages because De Sollar had acted in good faith and that there was no direct showing of actual damage. Finding that under these instructions the jury were at liberty to return a verdict for De Sollar if they thought Hanscome had suffered no damage, and that the judge's statement that the question of ratification was the main issue did not preclude the possibility that the verdict was based on another ground, this Court held that the verdict in the prior action

could not form the basis of an estoppel on the issue of ratification. It said (pp. 221–222):

> Now it is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment.
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> * * * * *
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> There is in this case no extrinsic testimony tending to show upon what the verdict of the jury was based. We have simply the record of the former judgment, including therein the testimony and the charge of the court from which to determine that fact, and in the light of the charge it is obviously a matter of doubt whether the jury found that the agreement made by the agent was ratified by the principal, or that no damage had in fact been sustained by placing the papers upon record. We are not now concerned with the inquiry whether the instructions of the court were correct or not. We look to them simply to see what questions were submitted to the jury, and if they left it open to the jury to find for the defendant upon either of the two propositions, and the verdict does not specify upon which the jury acted, there can be no certainty that they found upon one rather than the other. The principal contention, therefore, of the plaintiff fails.[11]

[11] For further applications of this principle, see *Flanigan* v. *Ditto, Inc.*, 91 F. 2d 1, 4 (C. C. A. 7); *Kelliher* v. *Stone & Webster*, 75 F. 2d 331, 335 (C. C. A. 5); *Vogel* v. *New York Life Insurance Co.*, 55 F. 2d 205, 208 (C. C. A. 5), certiorari

B. THE RECORD OF THE FIRST TRIAL FAILS TO ESTABLISH THAT THE JURY NECESSARILY FOUND THAT PETITIONER HAD NOT ENTERED INTO A CORRUPT AGREEMENT WITH THE GREENBERGS ALONE

Applying the above principles in this case, we think it is clear that the acquittal on the conspiracy charge cannot form the basis of an estoppel because the jury had before it alternate grounds on which to reach its conclusion and it is impossible to tell from the record of the first trial on just what basis the judgment of acquittal rests. Petitioner contends that the first trial definitely determined that his letter of March 3d, the crucial factor at the second trial, was not written pursuant to a corrupt agreement with the Greenbergs, and hence that, on the second trial, the jury should not have been allowed to find that the letter was written pursuant to such an agreement. He argues (Pet. 5) that the only issue submitted to the jury on the first trial was whether petitioner had entered into a conspiracy with the Greenbergs. We submit that the record of the first trial fails to establish that such was the only possible basis for the jury's verdict, and that the jury could have acquitted the petitioner even though it found that the March 3d letter was written pursuant to a corrupt agreement with the Greenbergs. The acquittal at the first trial can, we believe, be held at most to establish only one

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denied, 287 U. S. 604; *United States* v. *Halbrook*, 36 F. Supp. 345, 349–350 (E. D. Mo.), and cases cited; see also Freeman, *Judgments*, 5th ed., vol. 2, pp. 1365, 1455, 1460.

fact, that petitioner was not a party to an over-all conspiracy involving petitioner, the Greenbergs and their corporation, and the S. J. Baron Corporation.

While the district judge indicated that the verdict of acquittal might have been based on the failure of the jury to find the commission of an overt act (R. 75, 77, 78), we do not think there is any real basis for such a conclusion, whether the jury gave consideration only to a conspiracy involving petitioner and the Greenbergs or to a more extended one involving also the Baron Corporation. There was no denial of the commission of any of the overt acts alleged which were attributable to either type of conspiracy—delivery of the Baron letter and petitioner's letter of March 3d, filing of false applications, etc. We do think, however, that the record of the first trial very clearly establishes that the entire case was predicated on the theory that petitioner was party to an over-all conspiracy extending beyond his immediate transactions with the Greenbergs and involving parties other than petitioner and the Greenbergs, that the case was submitted to the jury on that theory, that the jury was never definitely or even impliedly told that petitioner could be convicted even if he was not a party to the over-all conspiracy but merely entered into a separate corrupt agreement with the Greenbergs. As the case was presented, summed up by counsel on both sides, and submitted to the jury by the judge, there was at least as great, if not a greater, possibility that

the jury was impelled to return the verdict of acquittal on a finding that petitioner was not a party to the over-all fraud, as on a finding that petitioner did not write the March 3d letter pursuant to an agreement with the Greenbergs for the purpose of enabling the Greenbergs to deceive the rationing board.

In addition to petitioner and the Greenbergs and their corporation, the indictment named four others, including the Baron Corporation, as defendants. It recited overt acts committed by defendants other than the Greenbergs and petitioner, as well as overt acts by one of the Greenbergs not relating to any of the defendants. There can be no question that it was the theory of the indictment that all the persons named therein as defendants were copartners in a comprehensive, continuing fraud. And there can be no doubt that the Government presented its case on the basis of that theory. A considerable portion of the testimony and documentary evidence related to the defendants as to whom a verdict of acquittal was directed, to the Baron Corporation, and to the Greenbergs' transactions with corporations not indicted. Further, as the case finally evolved, the summations of counsel invited the jury to give thought to the duration of the scheme, the Greenbergs' other frauds, and the relationship of the Baron transactions to a conspiracy common to petitioner, the Greenbergs and the Baron Corporation. As set forth in the

Statement (*supra*, p. 9), the Government had introduced in evidence a letter similar to petitioner's letter of March 3d, written by the Baron Corporation, which had pleaded *nolo contendere* and was not on trial, and had produced evidence as to the negotiations between the Greenbergs and the broker for the Baron Corporation preceding the writing of that letter. The Government had also introduced evidence of the Greenbergs' fraud relating to sugar products allegedly delivered to corporations not named in the indictment (*supra*, pp. 6–7), on the theory that this showed the prior existence of the plan which petitioner knowingly joined. Government counsel referred to that evidence in his summation and asked the jury to infer the existence of a common plan from the similarity between the Greenbergs' transactions with Baron and their transactions with petitioner. (See Statement, *supra*, pp. 11–12). Defense counsel, on the other hand, stressed the fact that Greenberg had started to defraud the rationing board before petitioner's letter of March 3d was written. He made a definite point of the fact that the evidence failed to show a connection between his client and the Baron Corporation, and he said (Tr. 538–539):

> We decline to be responsible for any of their [the Baron's] activities with the Greenbergs or the activities of any other persons and the Greenbergs.

His point was a good point, as the recent decision of this Court in *Kotteakos* v. *United States*, 328 U. S. 750, establishes.[12] How can we say that it did not impress the jury?

It is also clear that the judge submitted the case to the jury on the theory that they could find that petitioner was a party to the over-all fraud. He allowed the evidence of the Greenbergs' other frauds and dealings with persons other than petitioner, including the Baron Corporation, to go to the jury. As a matter of fact, although he said that he was going to tell the jury to disregard the testimony relating to the Royal Crown companies and William C. Franklin, their president, the defendants as to whom he directed an acquittal (Tr. 507–508), he never actually did so.[13] His entire charge is keyed to the conviction, which he had earlier voiced (Tr. 506–507), that the jury could find that petitioner was part of an over-all conspiracy embracing the Baron Corporation. He said (Tr. 565):

> You, of course, must determine from the evidence whether or not a conspiracy existed, and then if you find that a conspiracy did exist, you must determine who were the members thereof. Of course, if

[12] In that case, it will be remembered, a single conspiracy was charged, but in proof it turned out to be several distinct conspiracies having a common center, spokes, but no rim, and the variance was held to be fatal.

[13] In his charge he merely told the jury to return a verdict of not guilty as to them (Tr. 563).

you should find that there was no conspiracy, that would end the matter completely.

He went on to say (Tr. 565–566):

> In the event that you determine that a conspiracy did exist and that the defendant conspired with others named in the indictment, whether they are actually on trial or not, then for such of them as you may find to have been engaged in the conspiracy, certain rules will apply.
>
> * * * * *
>
> It is necessary, of course, to show that the defendant conspired and that all of the co-conspirators, the alleged co-conspirators, rather, had a purpose common to each of them, and that common purpose is an essential prerequisite.

And further (Tr. 567):

> I have told you that it is necessary that a common purpose be shown, a purpose to effect something, some end or aim, which purpose is common to all. Now, how that may be shown is a matter to be determined from the evidence. It may, of course, be inferred where the parties concerned are pursuing the same object and adopt means leading to the same unlawful result. It is not necessary that all of the alleged conspirators know all and each of the other alleged co-conspirators, or be acquainted with them.

Later, after giving the charge that acts of persons found to be members of a conspiracy are ad-

missible against all even though each does not know of the others' acts (Tr. 568), the judge said (Tr. 569):

> I shall repeat to you that the common design, which is the essence of the conspiracy, may be shown by proof of acts or circumstances from which a mutual understanding may be inferred, but you must be satisfied beyond a reasonable doubt that there was a meeting of the minds of all concerned insofar as the objects of the conspiracy are concerned.

Clearly, we think the jury could well have received the impression that they had to find that petitioner was a knowing party to the whole general conspiracy submitted to them.

Perhaps even more significant in this respect than what the judge actually said is what he failed to say. We have looked in vain throughout the charge for any direct statement, or any statement which could fairly be read as implying, that the jury could convict petitioner of the offense charged if they found that, although he was not a party to the Greenbergs' whole crime, he was implicated to a more limited extent. The only statement to which petitioner refers as support for his theory that the verdict determined that he did not enter into a corrupt agreement with the Greenbergs alone is the judge's reading of his request No. 12 (Tr. 578) to the effect that—

> If upon a consideration of all the evidence you entertain a reasonable doubt as

> to whether this defendant conspired or confederated or agreed with the defendants Greenberg or Fresh Grown Preserve Corporation, New Jersey, or either of them, to commit the crime charged, then the defendant must be acquitted.

But the judge also said, "That I have already charged, but I will repeat it."

It is impossible, we think, to read this portion of the charge, in its setting, as an instruction to the jury that they could find petitioner guilty of a limited conspiracy with the Greenbergs based on the March 3d letter. It is as much a charge on reasonable doubt as on the facts, and the judge seems so to have understood it since he stated that he had already given the charge and there had been no charge on specific facts. Indeed, of the twelve requests to charge, the 12th request was one of eight which specifically dealt with reasonable doubt (Tr. 584–586), as to most of which the judge indicated that he had already charged in substance (Tr. 576–578). Four requested instructions on reasonable doubt (2d to 5th, Tr. 584–585), which the judge rejected because he had already covered them in his charge or would not charge in the language requested (Tr. 576), were quite analogous to the 12th. Furthermore, the 12th request, very properly, told the jury that they must at least find an agreement with the Greenbergs, that if they did not find that much they must acquit, but the charge did not tell them

that if they found that much, such finding in itself was enough to convict.

Reading the charge as a whole, particularly in the light of the range of the evidence adduced at the trial, we think the jury might very well have understood that in order to convict they had to find that petitioner was a knowing party to the over-all fraud of the Greenbergs. But because of the failure of the evidence directly to connect petitioner with the Greenbergs' fraud in the Baron transactions or in their initial transactions, the jury might very well have declined so to find despite the judge's instructions. As we have indicated, such a conclusion is legally correct under the *Kotteakos* case. It is important to remember that the jury is not solely a fact-finding body. The jury is a body which also has the function of applying to the facts as it finds them the legal principles as to which they are instructed by the judge. See the full discussion of this subject in *Morris* v. *United States,* 156 F. 2d 525 (C. C. A. 9). In this case, the jury could very well have found that petitioner entered into a corrupt agreement with the Greenbergs pursuant to which he wrote the letter of March 3d, and still conclude, under their law-applying function, that they ought not to hold petitioner guilty since they did not think he was a party to the broader conspiracy to which their consideration was invited. It is true that they might also have found that petitioner did not write the letter of March 3d

pursuant to agreement with the Greenbergs for the purpose of enabling the Greenbergs to defraud the rationing board. But they did not necessarily have to find that fact to reach their verdict. Whether the verdict rested on one ground or the other, or on some entirely different and less rational basis, neither we nor petitioner nor this Court can determine. All that we know is that the jury found that petitioner was not a party to the over-all fraud as to which they were called upon to pass. Applying the doctrine of estoppel, we may take it as established that petitioner was not party to a conspiracy involving the Greenbergs and the Baron Corporation. But since innocence of that conspiracy is not necessarily incompatible with knowing assistance to the defrauding of the rationing board by the Greenbergs, the acquittal on the first trial cannot be taken as in any way establishing that petitioner did not enter into an agreement with the Greenbergs pursuant to which he wrote the letter of March 3d for the specific purpose of enabling the Greenbergs to obtain and sell to him sugar in the form of syrup to which he was not entitled.

The verdict of acquittal may be taken as establishing that the whole offense presented to the jury was not proved, but it is not proof one way or the other as to any component part of that offense. That is made abundantly clear by the decision of this Court, through Mr. Justice Holmes, in *United States* v. *Adams*, 281 U. S. 202.

There the defendant had been acquitted of making false entries in the books of a federal reserve bank of which he was president, with intent to defraud the bank and the bank examiners, and the making of the entries was apparently not disputed. He was subsequently indicted for making false entries in a financial report of the condition of his bank. After pointing out that the first trial would not sustain the plea of double jeopardy since the offenses were different, but that the doctrine of collateral estoppel would apply, Mr. Justice Holmes said (p. 205):

> * * * It [the judgment of acquittal] establishes that at the time of making the entries, the defendant was not guilty of an intent to defraud the bank or the examiners. It does not establish that the entries were true, although that might have been a ground for the verdict. *Washington, Alexandria & Georgetown Steam Packet Co.* v. *Sickles,* 5 Wall. 580. *De Sollar* v. *Hanscome,* 158 U. S. 216, 221, 222. An alternative possible ground is that although the entries were untrue the defendant believed them to be true or for some reason believed them to be justified.

Reading that statement, in the light of the cases cited, which we have discussed, *supra,* pp. 29–31, it is clear that *United States* v. *Adams* means that, where the grounds for the verdict are uncertain, the verdict can be taken as establishing only the defendant's innocence of the entire issue that was

submitted to the jury for determination; that a court cannot speculate as to which possible basis the jury relied upon in reaching its conclusion. Hence, in this case, the verdict established that petitioner was not part of a general conspiracy with the Greenbergs and others; it did not establish that he had not entered into a corrupt agreement with the Greenbergs, pursuant to which he wrote the letter of March 3d.

At the second trial, the Government was not required, in order to establish petitioner's guilt as an aider of the substantive offenses charged, to show that petitioner participated in a conspiracy involving persons other than the Greenbergs. It was required to show only that he knowingly assisted in the presentation of false invoices to the rationing board. It showed that by proving that petitioner originated the idea of using the name of the Brooklyn Navy Yard, that he wrote the letter of March 3d, which was false, for the express purpose of enabling the Greenbergs to use that letter, if needed, to show deliveries to an exempt agency, and that he received the benefits of the fraud perpetrated on the rationing board. Since none of the facts upon which the Government relied to establish guilt at the second trial were necessarily determined by the acquittal at the prior trial, the principle of collateral estoppel never came into play.

Petitioner, relying on the doctrine of collateral estoppel, has the burden of proving that the

identical issues as to which he seeks to bar proof, were definitely determined at the prior trial. *National Lead Co.* v. *Nulsen,* 131 F. 2d 51, 56 (C. C. A. 8), certiorari denied, 318 U. S. 758; *Vogel* v. *New York Life Insurance Co.,* 55 F. 2d 205, 207 (C. C. A. 5), certiorari denied, 287 U. S. 604. As we have shown, the prior record fails to establish that the jury necessarily found that the letter of March 3d was not the result of a corrupt agreement between petitioner and the Greenbergs. Hence, the judge very properly refused to take the acquittal at the first trial as evidence of such fact and properly declined to allow petitioner to present the acquittal to the jury as evidence of such fact. Accepting the doctrine of collateral estoppel as applicable to successive criminal prosecutions, the judge correctly ruled that it was inapplicable here.

CONCLUSION

For the reasons indicated, it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 174.—October Term, 1947.

Robert Sealfon, Petitioner, *v.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 5, 1948.]

Mr. Justice Douglas delivered the opinion of the Court.

This case presents the question whether an acquittal of conspiracy to defraud the United States precludes a subsequent prosecution for commission of the substantive offense, on the particular facts here involved.

Two indictments were returned against petitioner and others. One charged a conspiracy to defraud the United States of its governmental function of conserving and rationing sugar by presenting false invoices and making false representations to a ration board to the effect that certain sales of sugar products were made to exempt agencies.[1] The other indictment charged petitioner and Greenberg with the commission of the substantive offense,[2] *viz.*, uttering and publishing as true the false invoices. The conspiracy indictment was tried first and the following facts were shown:

Defendant Greenberg manufactured syrup and approached Sanford Doctors, a salesman for a brokerage concern, to sell vanilla syrup. Doctors negotiated some sales to petitioner who did a wholesale business under the name of Sero Syrup Co. Thereafter Greenberg asked Doctors to get a list from petitioner showing the places where petitioner made sales and told him that if any sales

[1] See § 28 Criminal Code, 18 U. S. C. § 72.

[2] See § 332 Criminal Code, 18 U. S. C. § 550.

were made to exempt agencies, Greenberg could sell to petitioner in larger quantities. Doctors so informed petitioner and some time thereafter petitioner wrote to Greenberg saying, "at the present time some of our syrups are being sold at the Brooklyn Navy Yard" and various defense plants. Petitioner did sell some of his syrup to a vending company which had machines at the Navy Yard but it was not vanilla syrup and no sales were made to the Navy Yard as such. Greenberg thereafter presented a series of false invoices to the ration board purporting to show sales to petitioner for delivery to the Navy Yard. Petitioner's letter was never shown to the board. On the basis of these invoices Greenberg received replacement certificates for 21 million pounds of sugar, 10 million of which he sold to petitioner in the form of vanilla syrup, and which was by petitioner sold to non-exempt consumers, mostly the National Biscuit Company. Petitioner at first made payments to Greenberg by check but thereafter gave checks to his trucker which the latter cashed, deducted his trucking fee, and paid Greenberg.

The jury returned a verdict of not guilty as to petitioner.[3] Thereafter a trial was had on the other indictment which charged petitioner and Greenberg with uttering and publishing as true the false invoices introduced in the conspiracy trial. Greenberg pleaded guilty and the trial proceeded against petitioner on the theory that he aided and abetted Greenberg in the commission

[3] The conspiracy indictment also named Leo and Murray Greenberg, Fresh Grown Preserves Corporation in which the Greenbergs were officers (all of whom we refer to simply as Greenberg), the S. J. Baron Corporation, the Royal Crown Bottling Co. of Baltimore, Inc., Royal Crown Bottling Co. of Washington, Inc., and William C. Franklin, president of the Royal Crown companies. Greenberg pleaded guilty, Baron Corporation pleaded *nolo contendre*, and verdicts were directed for Royal Crown and Franklin. It was charged that the Baron Corporation participated in the conspiracy by writing a letter similar to that written by petitioner, discussed hereafter.

of the substantive offense. The false invoices, the letter from petitioner to Greenberg, and essentially the same testimony were again introduced against petitioner. In addition, it was brought out on cross-examination that petitioner had unsuccessfully sought replacement certificates from his ration board for sugar contained in syrups sold at the Navy Yard and defense plants. Greenberg gave testimony from which the jury could conclude that petitioner was a moving factor in the scheme to defraud which was constructed around petitioner's letter and that he was familiar with Greenberg's intention to submit false invoices. Greenberg further testified that petitioner received $500,000 in cash under the agreement as a rebate of two cents a pound on all replacement sugar which Greenberg received on Navy Yard invoices whether or not it was used in syrup sold to petitioner. This time the jury returned a verdict of guilty and petitioner was sentenced to five years' imprisonment and fined $12,000.

Petitioner moved to quash the second indictment on grounds of double jeopardy (abandoned in this Court) and *res judicata*, and also objected to the introduction of the evidence adduced at the first trial. The district judge ruled against petitioner, and the court below affirmed. 161 F. 2d 481. We granted the petition for a writ of certiorari because of the importance of the question to the administration of the criminal law.

It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. *Pinkerton* v. *United States*, 328 U. S. 640, 643. Thus, with some exceptions, one may be prosecuted for both crimes. *Ibid.* But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (*United States* v. *Oppenheimer*, 242 U. S. 85, 87; *United States* v. *De Angelo*, 138 F. 2d 466, 468: 147 A. L. R. 991; see *Frank* v. *Mangum*, 237 U. S. 309, 334) and operates to

conclude those matters in issue which the verdict determined though the offenses be different. See *United States* v. *Adams*, 281 U. S. 202, 205.

Thus the only question in this case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial.

Respondent argues that the basis of the jury's verdict cannot be known with certainty, that the conspiracy trial was predicated on the theory that petitioner was a party to an over-all conspiracy ultimately involving petitioner, Greenberg, and the Baron Corporation.[4] Thus it is said that the verdict established with certainty only that petitioner was not a member of such conspiracy, and that therefore the prosecution was not foreclosed from showing in the second trial that petitioner wrote the letter pursuant to an agreement with Greenberg to defraud the United States. The theory is that under the instructions given the jury might have found that petitioner conspired with Greenberg and yet refused to infer that he was a party to the over-all conspiracy.

The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict. Cf. *De Sollar* v. *Hanscome*, 158 U. S. 216, 222. Petitioner was the only one on trial under the conspiracy indictment. There was no evidence to connect him directly with anyone other than Greenberg. Only if an agreement with at least Greenberg was inferred by the jury could petitioner be convicted. And in the only instruction keyed to the particular facts of the case the jury was told that petitioner must

[4] See note 3, *supra*.

be acquitted if there was reasonable doubt that he conspired with Greenberg. Nowhere was the jury told that to return a verdict of guilty it must be found that petitioner was a party to a conspiracy involving not only Greenberg but the Baron Corporation as well.[3] Viewed in this setting, the verdict is a determination that petitioner, who concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud.

So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical. As we read the records of the two trials, petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way. Indeed, respondent does not urge that he could. Thus the core of the prosecutor's case was in each case the same: the letter, and the circumstances surrounding it and to be inferred from it, and the false invoices. There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement, petitioner's participation therein, and what he may have got out of it. But at most this evidence only made it more likely that petitioner had entered into the corrupt agreement. It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do.

Reversed.

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[3] That was the view of the judge who tried both cases. At the second trial he characterized as follows the charge and the verdict at the first: ". . . what was tried on the 11th of December was a charge of conspiracy and what the jury by its verdict determined was that Sealfon had not entered into common agreement with the Greenbergs and the Fresh Grown Company to violate the law."